

Post-Divorce Maintenance Rights for Muslim Women in Pakistan and Iran: Making the Case for Law Reform

Ayesha Shahid

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INTRDUCTION: This article examines the issue of giving *Mata'at-ul-Talaq* (post-divorce maintenance) rights to Muslim women in Pakistan and Iran.¹ In some Muslim countries the right to receive post-divorce maintenance beyond *Iddat* has been recognized in the law, while in others it continues to be restricted to the *Iddat* period only.² While there is no dispute among Islamic scholars regarding general provisions of maintenance to the wife during her *Iddat*, there is no unanimity of opinion regarding post-divorce maintenance beyond this period which generally extends until her death or remarriage to another man (Moosa and Karbanee 2010). By using a comparative and plural legal interpretative methodology this article explores to what extent the law reform process can take place in a creative way to give post-divorce maintenance rights to Muslim women in plural legal settings, such as Pakistan and Iran.³

Family law in Pakistan and Iran is influenced by formal and informal plural normative orders which appear in the form of statutory law, as well as customary, religious and patriarchal norms. At the formal level, state legislatures' national formulations of family law reflect the presence of such plural norms. Plurality also appears in the interpretation and application of statutory law by the judiciary, whether through the content of legislation or through court decisions as well as in the varying interpretations of the religious text. Moreover due to the absence of a welfare system, no clear-cut family law policy, and weak state enforcement mechanisms, states absolve themselves from the obligation to provide for the welfare of its citizens. By engaging with feminist perspectives, human rights discourse, and primary sources of Islamic law this article aims to search for a common legal and social ground on the basis of which Muslim women can

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¹ The Arabic term for post-divorce maintenance is *Mata'at-al-Talaq* or *Nafaqat-al-Mut'a*, i.e. a payment by the former husband to his ex-wife after the expiry of the *Iddat* period. The word *Mata'a* has been used in the *Qur'an* in at least 14 places. As there is no standard method of transliteration from Arabic to English, there are numerous ways to spell certain key words. For consistency, in this article the word is herein spelled as *Mata'a* or *Mata'at-ul-Talaq*. The *Qur'an* uses the word *Mata'a* for maintenance and gift; however, it should not be confused with *Nafaqah* (maintenance during marriage) or *mahr* (dower), as the three are independent concepts of Islamic law. *Mata'a* can be in the form of clothes, property or money commensurate to the position and the capability of the ex-husband. Islam does not fix the sum of *Mata'a* and it depends on the consensus of both parties. However, if parties cannot agree on the sum, then the Court will decide based on the financial ability of the ex-husband and circumstances of the ex-wife.

² A waiting period, observed by a woman after the death of her spouse or after a divorce. During this period, she cannot remarry. The waiting period is 3 months after a divorce and 4 months and 10 days after the death of a spouse. The *Iddat* of a pregnant woman is up to the time of delivery, irrespective of the fact whether the marriage was ended by divorce or death of the husband. The primary object of *Iddat* is to find out if the woman is pregnant so that the paternity of the child can be ascertained.

³ Professor Shaheen Sardar Ali used this term in her recent book, *Modern Challenges to Islamic Law* (Cambridge University Press 2016). By using the same methodology in my article, I present a case for reforming the existing legislation and to give women the right to receive post-divorce maintenance beyond the *Iddat* period.

have the right to receive post-divorce maintenance in Pakistan and Iran. Many questions and issues are raised, including whether the right to post-divorce maintenance is a right or a duty; is it an unqualified right of a woman or a contractual right under Islamic law?; is it fair that the right to maintenance should cease to exist after *Iddat* in cases where the wife has been divorced without her consent and/or through no fault of her own, and has no means to support herself?; should provisions for post-divorce maintenance be extended to every woman (irrespective of whether she is a housewife or a working woman or, in the case of polygamous marriages, whether being the first or a subsequent wife) or should it purely be on the basis of their financial status?; Why is it necessary to have such a provision for maintenance after divorce and what socio-economic factors need to be considered while determining *Mata'a*?; Why is it that in some Muslim states provisions for *Mata'a* have been incorporated in legislation while in other such states it has not been included in family law?; And finally, at a general level of state and society, why has the discourse of justice, compassion and welfare in Islamic law not been addressed with regard to post-divorce maintenance rights?

The first section provides a comparative overview of the socio-economic status of women in Pakistan and Iran, in order to understand why it is indispensable to include post-divorce maintenance provision in family law in Pakistan and Iran. This section also examines the women's movement silence on the issue of post-divorce maintenance in both countries. The second section critically analyses constitutional and legislative provisions. The third section examines the response of the judiciary in post-divorce maintenance cases in Pakistan and Iran. Finally, it is suggested that by taking up a hybrid approach and using Islamic sources of law and the general framework of human rights and gender justice, family law reform can take place and the right to receive post-divorce maintenance can be extended to divorced Muslim women in Pakistan and Iran.

I. WOMEN IN PAKISTAN AND IRAN: A COMPARATIVE OVERVIEW

A. Socio-Economic Position of Women in Pakistan and Iran

The socio-economic status of women in Pakistan and Iran presents an interesting point for comparison. The status of women in Pakistan and Iran varies considerably across classes, regions, and the rural/urban divide. Other factors that contribute to women's subordinate status in society are tribal, feudal and patriarchal structures as well as the uneven socio-economic development in the country. Customary practices, cultural norms and distorted interpretations of religion often override statutory laws, interfering with women's rights to protection in marriage and divorce (Jilani and Ahmed 2004; Ali 2000; Nouri *et al* 2010; Osanloo 2010). Local customs and traditional practices often presented as 'law' and incorrectly attributed to the tenets of Islam, in fact have roots in tribal and clan-based practices (Mansuri 2008; Mumtaz and Shaheed 1988; Critelli 2012). Statutory laws, particularly those protecting and guaranteeing women's rights, are often unknown, ignored or broken rather than honoured and enforced. Women in both urban and rural areas are still discriminated due to patriarchal structures and male domination. These women in the words of Fareeda Shaheed (2012, 16), "seem to be petrified in another century untouched by events and developments outside their immediate circles, and tightly controlled by traditional male gatekeepers of the family and community". The former UN Special Rapporteur on Iran in his report stated that the subordinate status of women in Iranian society is perpetuated by two main factors: patriarchal values and attitudes favouring the norm of

male supremacy, and a state-promoted institutional structure based on hard-liner interpretations of Islamic principles (Shaheed 2014, 5). Both factors emphasise the notion that a woman’s role is primarily that of a wife and a mother, which is used as justification for restricting women’s public lives.

While facing deeply-embedded cultural and legal discrimination, women in Iran and Pakistan have made significant advancements in various fields of life. In both countries, women’s participation in the employment sector has increased over the years, however their employment presents a mixture of startling contrasts and contradictions. There have been exceptional women who have occupied positions of pre-eminence in both countries but they are still in minority.⁴ Women’s advancement in these spheres takes place under strict surveillance and within well-defined boundaries, transgression of which could be ‘fatal’ (Entick 2006, 8). By universal standards, women are still confronted with economic, social and legal barriers to the full enjoyment of their human rights, and are excluded from equal partnership in determining the parameters of social relationships in the public as well as private spheres of life.

In Pakistan despite an increase in women’s employment, statistics show that the number in the formal and informal employment sector is still very low.⁵ While women comprise half of the population of Pakistan, their formal labour participation over the years is the lowest in the region, ranging between 9-26% with wide provincial variations. In the informal sector, around 14 million women are engaged in employment but the working conditions are exploitative and discriminatory. Employment discrimination not only limits job opportunities but also deprives them of equal wages for equal work based on gender. Social constraints also limit women’s work outside home, and also what kind of work they can engage in (UN Women: Women’s Economic Participation and Empowerment in Pakistan. Status Report 2016, 18).

In Iran, women’s participation in the labour market has remained stagnant. Women face an array of legal and social barriers restricting not only their lives but their livelihoods and contributing to starkly unequal economic outcomes. Stereotype gender ideology has played a role in creating barriers to women’s professional advancement (Rashti and Moghadam 2011, 437). Although women comprise over 50 percent of university graduates, their participation in the labour force is

⁴Women have held positions as parliamentarians, ambassadors, UN representatives and office holders, judges, high-ranking bankers, chartered accountants, doctors, pilots and engineers. In Pakistan Mrs Benazir Bhutto was appointed twice as the Prime Minister. Whereas in Iran was appointed as the Deputy Prime Minister. Whereas in 2009 in Iran after 30 years Marzieh Vahid Dastjerdi was appointed as the first female cabinet minister for health. More recently in 2017 Iranian President Hassan Rouhani appointed Massoumeh Ebtekar and Laya Joneydi as two female vice presidents of the country. However it is much more important to have gender-sensitive and feminist policies than just merely relying on descriptive representation.

⁵ According to the National Commission on the Status of Women Government of Pakistan’s ‘Inquiry Report on the Status of Women Employment in Public Sector Organizations’, in Pakistan women workers in formal sectors stand at 13.45%, occupying less than a quarter of 1% in the combined categories of legislators, senior officials, managers, one half of 1% as technicians and associate professionals and 0.83% of professionals. Female participation in the labour market is 21.7% compared to 84.9% for men.

only 17 percent (Human Rights Watch 2017). The average rate of women's unemployment has doubled that of men in the past ten years, particularly during the tenure of Mahmoud Ahmadinejad. In 2014, 1,300,000 Iranians with academic degrees were unemployed. According to the Global Gender Gap Report (World Economic Forum, 2014) the Islamic Republic of Iran ranked 141 out of 145 countries. In this report, although Iran fared relatively well with regard to education and health care, it was rated poorly in terms of economic participation and political empowerment. Furthermore, men earn 4.8 times more than women. With regard to women in ministerial positions, the index ranked the Islamic Republic of Iran 105 out of 142 countries, and there are few women in managerial or decision-making roles.

The laws in Iran also limit women's participation in the public sphere. Article 1117 of the Civil Code allows a husband to prevent his wife from working in a profession or trade deemed incompatible with the interests of the family or with his or his wife's dignity. Since the coming into effect of Article 18 of the Family Protection Act, a husband's decision as to what constitutes incompatibility with family interests must be approved by a competent court (Women Living Under Muslim Laws 2014, 3). In a further recent development on 2 November 2015, the Iranian Parliament voted in favour of the general framework of the 'Comprehensive Population and Family Excellence Plan'.⁶ This legislation includes provisions that can potentially lead to discrimination against women and violation of their right to work.⁷ In addition to violating a woman's right to work, the bill is an infringement of the prohibition of arbitrary interference with a woman's privacy and family. While supporting the bill, the 53 members of the parliament have failed to consider that not all women have an independent means of income or financial assets to support themselves. Women who would be unable to gain employment, will in the case of divorce or death of the husband, be left in a precarious situation. This will have a long-term negative impact on women by not only further restricting their participation in employment, but will also lead to a financial vulnerability in case of divorce.

The increase in divorce rates, both in Pakistan and Iran has an impact on the socio-economic position of women. In Pakistan, the divorce rate has increased by 40 to 50 per cent.⁸ This rise has left many women in a vulnerable situation as husbands refuse to pay maintenance allowance to the former wife and children. Since 2006, the rate of divorce in Iran has increased around 20 per cent, despite that Iran has recently created a law to make divorce by mutual consent invalid unless couples have first undergone state-run counselling (Nayyari 2013; Nouri *et al* 2012).

⁶ The Comprehensive Population and Family Excellence Plan aims to "increase the pregnancy rate to 2.5% of the quantitative population growth until the year 2025". To achieve this end, the state is intending to deny some women, particularly single women, access to jobs in the hope that it would encourage them to stay home and bear children.

⁷ Article 9 of the legislation states that "to encourage marriage, employment for all governmental and non-governmental sectors shall be granted in the following order: married men with children; married men without children; women with children". It further states that hiring "single individuals to faculty positions in all public and private education and research institutions, will be prohibited for five years after the date that this Act goes into effect. Only the absence of qualified married applicants would permit the hiring of single individuals, and this would require the approval of the highest-ranking authority in the [relevant] organisation."

⁸ According to a more recent survey in 2015, the data collected from various courts in Lahore shows that as many as 12,913 women approached various family courts in Lahore during the first ten months of the year 2014 to seek divorce from their husbands.

Besides, in both countries, the traditional family system is diminishing and traditional family support is no longer available.

Poverty is another issue that has a tremendous impact on divorced women in both countries. Pakistan is the sixth most populous country in the world with a projected population of 188 million, of which women constitute half. There, 62 per cent of the population is living below the poverty line, earning less than 2 US Dollars a day.⁹ In Iran, approximately 55 per cent of its urban population lives below the poverty line.¹⁰ Estimates suggest that approximately 23.3 million Iranian city dwellers live under the poverty line and cannot subsist on their incomes.¹¹ These statistics clearly reflect that in the absence of a social welfare system and post-divorce maintenance provision in the law, divorced women from such poor backgrounds will be left in a precarious financial situation.

While discussing the need for post-divorce maintenance, it is also important to highlight the occurrence of violence against women in Pakistan and Iran which stems from deep-rooted notions of gender inequality. In both countries, women and girls remain inadequately protected against sexual and other gender-based violence, including early and forced marriage. In Pakistan, infliction of violence in its various forms and manifestations results in the worst violation of women's rights. Domestic violence exists in both visible and covert forms, making it difficult to assess the number of victims.¹² Recently, laws in Pakistan have been framed at the provincial level to extend protection against domestic violence; however, prosecution rates for offences are still extremely low, with women frequently too afraid to report crimes or being intimidated into withdrawing complaints.¹³

The prevalence of domestic violence across different regions in Iran has been examined in various studies (Tizro 2013). Garrusi *et al.* (2008) reported the prevalence rates of emotional (60.7%), physical (41.4%), and sexual (25.2%) violence suffered by women attending health

⁹ Pakistan Social and Living Standard Measurement Survey 2010–11, Government of Pakistan, Statistics Division, Federal Bureau of Statistics, Islamabad.

¹⁰ Defined by the Iranian government, poverty means a monthly income of less than 180,000 toman, the equivalent of roughly 600 US Dollars, for a family of five people.

¹¹ These figures do not include statistics for rural Iran.

¹² According to the 'The State of Human Rights' (2016) Annual Report Human Rights Commission of Pakistan there have been 1003 domestic violence cases, 386 burning (acid attacks, set on fire) cases, 988 kidnapping cases, 138 suicides, and 1001 suicide attempts.

¹³ The Punjab Protection of Women Against Violence Act 2016 prohibits all forms of violence against women including sexual, emotional, economic and psychological abuse, cybercrime, stalking and abetting of offenders. The law prescribes setting up of district protection centres, providing around the clock services to victims, including first aid, police reporting, FIR lodging, prosecution, medical examination, forensics and post-trauma rehabilitation under one roof. Similar acts have been passed by the Sindh and Balochistan provinces in Pakistan. In the province of Sindh the provincial assembly had passed the Domestic Violence (Prevention and Protection) Act 2013. Similarly, in Balochistan the provincial assembly passed the Balochistan Domestic Violence (Prevention and Protection) Act 2014. Another important legislative development is that in October 2016, two laws were passed titled the Anti-Honour Killing Laws (Criminal Amendment Bill) 2015 and the Anti-Rape Laws (Criminal Amendment Bill) 2015. The first law stipulates that an individual found guilty of murder on the pretext of honour will be liable to life imprisonment, even if the victim's family pardons the offender. The Anti-Rape Law gives legal cover to the collection and use of DNA evidence to prove that rape has been committed. It prescribes strict investigation procedures and any officer who does not inquire diligently is punishable by a three-year jail term, a fine, or both. The new law also states that anyone, including a public servant such as a police officer, who misuses his authority to commit rape will be liable to the death penalty or life imprisonment.

centres in Kerman. In Iran, the government has failed to adopt laws criminalising these and other abuses, including marital rape and domestic violence, although the Vice-President on Women and Family Affairs pushed a draft bill that has been pending since 2012. The UN Special Rapporteur on Iran, in a recent report, noted that the Iranian legal framework fails to adequately protect women from violence and to criminalise marital rape (Jehangir 2016). She notes that certain provisions might even condone sexual abuse, such as article 1108 of the Civil Code, which obliges wives to fulfil the sexual needs of their husbands at all times. The UN Human Rights Committee has also raised concerns about the absence of specific provisions for domestic violence within the Iranian Penal Code, as well as the lack of investigation, prosecution and punishment of perpetrators of domestic violence. (HRC 103rd session 17 October-4 November 2011, CCPR/C/IRN/CO/3).

The research studies from both countries indicates that one of the main reasons why women continue to live in abusive relationships and compel to tolerate violence inflicted by their husbands is due to their weak financial position and economic dependency on husbands along with the fear of being ostracised and divorced (Tizro 2013; Nouri 2010). They are aware of the fact that if divorced, they will be in a vulnerable situation with hardly any financial means to support themselves. Therefore, it is pertinent to include post-divorce maintenance provisions in family legislation that would provide women an option to leave abusive relationships.

Another important factor that needs to be highlighted is the lack of an effective system of legal aid in both countries. In Pakistan, under the Bar Council Free Legal Aid Rules 1999, free legal aid can be provided to litigants, but unfortunately, very few lawyers are willing to take up pro bono cases. According to recent research of poor households, the percentage that have received free legal aid is extremely low.¹⁴ The lack of an effective legal aid system has been further compounded by limited awareness of legal rights and procedures, thus the poor and vulnerable, in particular women, find themselves disconnected from the formal justice system. In Iran, the state can grant legal aid to individuals who can prove that they are financially unable to pay for their own court fees and it is also available from the Iranian Bar Association but not many women are aware of this right (UNCRC 3/2015, 35).

In Pakistan the law does not recognize the rights of women to matrimonial home or to property which may have been acquired during marriage. A woman cannot continue living in the house after being divorced. Similarly, a woman would have no ownership claim to household land despite working on it and despite the fact that her work (paid or unpaid, as household labour) may have contributed to the purchase of that land by the family during the marriage. (Ahmad, 2010) Though contribution in kind is not recognized under the law, if a woman is able to prove that she contributed cash, then, she may be able to lay a claim to property under the principle of *benaami* (anonymous) transactions. However, this is a difficult principle to prove and generally the law recognizes title only if a person's name is on the title document (Ahmad 2010). Inheritance rights are also often denied to women due to the customary practice of giving inheritance rights to male heirs only. (Mehdi, 1994; Ahmad et al 2016). The social implications of not giving women their share in ancestral property inheritance can be great, with these

¹⁴ 3% in Punjab, 25% in Sindh, 16% in Balochistan, 5% in Khyber-Pakhtunkhwa and 4% in Gilgit-Baltistan. 'Voices of the Unheard: Legal Empowerment of the Poor in Pakistan' (2012) Insaf Network Pakistan.

women being placed in precarious situations, where they do not have any source of income upon divorce.

In Iran, women receive a lower share as compared to the shares that men receive whether it is a husband, son or brother. Under article 913 of the Civil Code, a surviving wife may only inherit one-quarter of her husband's estate if the deceased left behind no children, and one-eighth of his estate if the deceased had done so. Compared to this, a surviving husband may inherit one quarter of his deceased wife's estate when there are children and the entirety of it when there are no children. Similarly, under article 907, sons inherit twice as much as that of daughters. Whereas articles 946 to 948 exclude real estate from the kind of properties that may be inherited by a surviving wife, which means that she will only be given 'the value' of her share but cannot inherit the real estate. In such situations, divorced women who do not have any source of income are left in a vulnerable situation.

The above discussion has shown that upon marriage breakdown women end up in an extremely difficult financial situation. It is therefore pertinent that financial support should be given by the former husband, especially in cases where it has not been the fault of the wife and if she does not have any means to support herself. Concerted effort by the human rights activists, women's rights activists, and religious scholars, as well as on the part of the state itself, is needed to ensure post-divorce maintenance provision is included in the legislation as a matter of serious concern for protecting divorced Muslim women's rights. The next section analyses the issue of post-divorce maintenance and women's movements in Pakistan and Iran.

B. Post-Divorce Maintenance and the Role of Women's Movements in Pakistan and Iran

The women's movement in Pakistan has played a significant role in raising a voice for women's rights and improving their status in the public and private spheres (Zia 1996; Shaheed and Mumtaz 1987; Jalal 1991; Sumar 2002; Zia 2009). In Pakistan women's rights activists have been involved in organised debate, discussion, and charting a course for placing women's concerns on the national agenda.¹⁵ Various governments have been pressurised, from time to time, to repeal discriminatory laws and enact laws and policies to provide protection to women. The women's movement in Pakistan played an important role in the 1980s by strongly protesting

¹⁵ The Women's movement in Pakistan has its roots in the independence movement or the 'Pakistan movement' for a separate homeland for Muslims of the Indian Subcontinent. Women constituted a vital force in this anti-colonial struggle for independence. In the initial years after the creation of Pakistan, the attention of women's organisations was primarily focused on issues related largely to the fields of education, employment and political participation. Only a handful of middle class educated women participated in building the infrastructure of the newly born state; however, they were often berated by the orthodox Muslims for leaving their homes and for engaging in politics. Despite this, they did not give up their struggle and continued to demand women's participation in the public sphere. It was due to the pressure from women's rights activists that, in the 1950s, the government was forced to set up a commission for reforming family laws, and later in 1961 on the basis of the recommendations of the commission, the government promulgated the Muslim Family Law Ordinance 1961 (MFLO). This was considered to be a major step in providing protection to women with respect to their marital rights although the provision for post-divorce maintenance was not included in this legislation. Through the 1972 reforms, women became eligible to join all the public services, including those previously closed to women, such as the police force, district administration and foreign services.

against the discriminatory *Hudood* laws and suppressive policies of General Zia ul Haq, the military dictator at that time.¹⁶

Women's movement also played an active role for the restoration of women's parliamentary seats and pressurising political parties to include women's issues in their manifestos. From 1990's onwards women activists found more negotiating space and shifted their efforts towards sensitising, negotiating, influencing and "infiltrating" government policy (Zia, 2009). Women activists also protested against the Shariat Act 1991, which presented the danger of potential misuse in the hands of reactionary groups who could interpret Islam in a highly restrictive manner. Lobbying by women's groups at least ensured that family law issues, particularly the MFLO, were taken out of its purview, leaving people wondering what purpose, if any, the Shariat Act of 1991 served.

In later years it was due to the concerted efforts of women's activists that the government enacted the Women Protection Act 2007. This act finally removed the teeth, if not the entire text of the infamous *Hudood* Ordinances (consensual sex remains technically criminalised but virtually impossible to prosecute). Most importantly the act overturned the belief that labelling a law 'Islamic' renders it sacrosanct and unchangeable (Zia, 2009). In recent years women rights activists have put pressure on the government and raised their voices against all forms of violence and this has led to the enactment of laws on harassment in the workplace and violence against women.¹⁷

There is no doubt that women's movement and women's rights activists have made huge contributions but in Pakistan the demand for post-divorce maintenance rights has not been on the agenda of women's movement in Pakistan. The focus has been on procedural changes rather than advocating substantive law reform (Ahmad 2015).

In Iran, the women's movement is built upon a long history of struggle for the rights of Iranian women.¹⁸ During the reign of Mohamad Reza Shah from 1942 to 1978, a number of new women

¹⁶ It also succeeded in pressurising the government when it decided to propose a new law of evidence, aimed at reducing the weight of a woman's testimony by stating that the evidence of two women would be equal to that of one man. Intense lobbying by women's organisations and activists resulted in a watered-down version of the Qanoon-i-Shahadat Act 1984 (previously known as the Evidence Act 1872).

¹⁷ Two important pieces of legislation are The Protection Against Harassment of Women at the Workplace Act 2010 and The Punjab Protection of Women Against Violence Act 2016. Similar Acts have been passed by Sindh and Balochistan provinces in Pakistan. Sindh was the first where the provincial assembly had passed the Domestic Violence (Prevention and Protection) Act on March 8, 2013. Similarly, in Balochistan the assembly had passed the Balochistan Domestic Violence (Prevention and Protection) Act on Feb 1, 2014. Another important legislative development has been that in October 2016 two laws were passed titled the Anti-Honour Killing Laws (Criminal Amendment Bill) 2015 and the Anti-Rape Laws (Criminal Amendment Bill) 2015.

¹⁸ The roots of the women's movement in Iran lie in the women's associations which emerged during the period of 1910-1932. During this period, women established a number of organisations and published many weekly or monthly magazines dealing specifically with issues related to the conditions of women's lives. During the reign of Reza Shah (1925-1941), efforts to support women's participation in public affairs were expanded. The government invested a great deal of money and resources in the expansion of schools for girls. In 1931, the government also introduced a number of changes in marriage and divorce laws. Women were given the right to seek judicial divorce under certain conditions and the minimum marriage age for girls was raised to 15 years and for boys at 18. Although

organisations emerged. Some of them were also affiliated with political parties. These organisations demanded equal political and economic rights, especially the right to vote, which was granted by Mohammad Reza Shah despite opposition by the religious leaders.¹⁹ Women organisations also were successful in pushing the government to pass the Family Protection Law 1975 which laid down tougher conditions for polygamy, raised the age of marriage for girls to 18, put divorce under the authority of family courts, and created more safeguards against men's unilateral right to divorce. Moreover, the government ignored the opposition of the religious forces and increased the number of women in executive positions with the aim to enhance their opportunities in the public sphere.

Women also became a major force for change in the 1979 Iranian Revolution and their participation in the revolution was historically unparalleled, both in terms of the depth and breadth of their commitment. All factions of women participated in the revolution for the diverse causes which they had been supporting over the years.²⁰ However, the changes in state politics and ideology of the state did not work for women. By resorting to *Shari'a* and the Iranian traditions, the government of the Islamic Republic of Iran successfully implemented a policy of unequal treatment of Iranian women under the law (Mahdi 2004, 440). In the first decade of the revolution, the state continued to take away the rights that women had previously gained. In the second decade, Iranian women started pressurising the state to retreat. They started questioning gender segregation, unequal division of labour, widespread domestic violence and the organisational and exploitative biases within the Iranian Islamic family (Mahdi 2004, 441). They were also able to persuade the state to bring law reform and to abolish discriminatory legislation. In present day Iran, the women's movement is addressing various issues ranging from awareness of human rights, individual rights, individual autonomy within marriage, family independence within the kinship network, economic empowerment and a form of national consciousness against global diffusion of modern values (Mahdi 2004, 444). Due to pressure from women's groups there has been some recognition of financial rights through legislative enactments.²¹ However the progression of women's activism in Iran rarely resulted in giant leaps or ground breaking reforms. At the same time a unified women's movement has yet to emerge in Iran that will band together various women's groups with one voice and revolt in the name of their own rights and agenda rather than as part of something else. It is unclear what circumstances will

Reza Shah favoured some changes in women's status, he gradually started pressurising women's organisations to withdraw their political demands and concentrate on their welfare and educational activities. The continual opposition to women's activities by the government and religious leaders forced many women's organisations to close down to the extent that in 1932, Reza Shah banned the last independent women's organisation, *Jamiat-e Nesvaan-e Vatan* in Iran.

¹⁹ However, after the 1963 attempted *coup d'état*, many political organisations were banned by the Shah. This had an impact on women's organisations as they came under close government surveillance and were forced to become apolitical, charitable, educational, and professional units. Despite this change, the government continued with its women-friendly policies and access to education and work outside of the home was made easier for women.

²⁰ Women, for instance, belonging to religious groups participated in the revolution to support the establishment of an Islamic state, while secular women participated in the revolution in opposition to the Shah's dictatorship. Women associated with Marxist organisations hoped for the establishment of a socialist state and the end to the Shah's regime as a puppet of Western imperialist powers. Whereas the majority of women, not devoted to any ideology or political orientation, joined the movement against the Shah in the hope that their country would be free of dictatorship, foreign domination and alienating cultural attitudes adopted by the Shah regime.

²¹ Financial rights are discussed in detail in the next section.

foster this union since it has not happened in times of Revolution or political calm, nor in times of war or peace.

One can thus say that over the years, the strategies of the women's movements in Iran and Pakistan have reflected significant shifts, from a focus on education and welfare to legal reform, and ultimately to women's political and economic rights. However there has been a conspicuous silence and an overall absence of a public debate on the issue of post-divorce maintenance rights by human rights groups, women activists, religious scholars, and even at the state level by representatives sitting in legislative assemblies. Is it because the middle-class women who are the leading voices for women's rights, being comparatively in stronger economic positions, are not much affected by the absence of such legislation on post-divorce maintenance? Or is it that there were other pertinent issues that have drawn their attention and were on their priority list? Or is it the slow response and half-hearted attempts by the governments that has disillusioned women activists? One reason could be the setback women activists have received by the attitude of the various governments who have, from time to time, made false promises and avoided issues that involve religious controversy. Another reason could be that the struggle for gender equality has been waged by a narrow class-base of the relatively more privileged women in both countries. Although they have been robust and vocal in demanding equality for women, due to their professional and upper-class background their experiences are different and they do not face the problems faced by women from a lower class. Furthermore, the language used in the debates for women's rights and the settings in which these take place are too far removed from the lived realities of the lower-class women. Perhaps the women's movement needs to be more inclusive and there is a need to bring in women from lower social classes to listen to their voices and lived experiences.

The following section engages in a critical analysis of the constitutional and legislative provisions in Pakistan and Iran, in order to explore the option of including post-divorce provisions in the laws of both countries.

II. Bringing Islam and Human Rights under the Same Roof: Pakistan and Iran's Complex Constitutional and Legislative History

A. Constitutional and Legislative Developments in Pakistan

Soon after independence, the First Constituent Assembly of Pakistan in 1949 passed the Objectives Resolution to maintain its Islamic identity. The Objectives Resolution reiterates that 'sovereignty over the entire universe belongs to Almighty God alone and efforts shall be made to enable Muslims to order their lives in accordance with the teaching and requirements of Islam'. The Objectives Resolution privileged one religion over all others, but was still passed, overriding the serious concerns of the minority members of the Constituent Assembly. Later, Pakistan was declared an Islamic Republic under the 1956 Constitution. Article 198 of the Constitution provided that the legislature would bring all laws into conformity with the 'Injunctions of Islam'. It also prohibited the enactment of any law repugnant to Islam. As compared to the 1956

Constitution, any reference to the injunctions of Islam in the 1962 Constitution was initially excluded. However, following protests from the National Assembly, the Islamic provisions of the 1956 Constitution were reinserted and the word ‘Islamic’ was once again made part of the official name of the state. The Preamble of the 1973 Constitution of Pakistan clearly states that ‘all laws have to be in conformity with the *Qur’an* and *Sunnah*’. Islam was officially declared as the state religion in the 1973 Constitution. The Islamic character of the constitution was further strengthened when in 1985, article 2-A was incorporated into the 1973 Constitution to require that all laws be consistent with the injunctions of Islam as laid down in the *Qur’an* and *Sunnah*. The effect of this move was to render Islamic law the constitutional basis of all state law (Yefet 2009, 347-378). One can thus argue that religion and Muslim identity have played a dominant role in framing the constitutional history of Pakistan. This history has thus laid down the ideological parameters of the state and defined its duties and obligations towards Islam (Ahmad 1993, 37-46).

The 1973 Constitution of Pakistan was the country’s first constitution that was produced by a democratic process. The preamble and principles of policy of the constitution pledge allegiance to an impressive catalogue of fundamental rights.²² The constitution recognises almost all the guarantees of the United Nations Universal Declaration of Human Rights, including the right to life and liberty, to privacy of home, and to human dignity.

The fundamental principles of equality and non-discrimination that form the basis for gender relations are enshrined in article 25 of the Constitution which states ‘All Citizens are equal before law and are entitled to equal protection of law’. Article 25(1) provides that ‘There shall be no discrimination on the basis of sex alone’. Family has always been predominantly seen as ‘the fundamental unit of society’ and it has received recognition in the constitutions of both countries. The Constitution of Pakistan emphasises that women play a major role in nurturing the family and raising upright children. Article 25(3) provides that ‘Nothing in this article shall prevent the state from making any special provision for the protection of women and children’. Article 35 ensures that the state shall take every measure to protect the marriage, family, mother and child.²³ Under article 37(d), the state shall ensure inexpensive and expeditious justice; thus, the fundamental rights and principles of policy clearly empower the state to protect women, children and family. However, the Islamic identity of the country was still maintained, as its preamble reiterates the same principle that all laws have to be in conformity with the *Qur’an* and *Sunnah*. Islam is also officially declared as the state religion in the 1973 Constitution. The Islamic character of the constitution was dramatically enhanced in 1985, when the ‘Objectives Resolution’ of the Preamble was made a substantive provision of the constitution. The newly adopted article 2A constitutionalised Islam, as all laws were required to be consistent with the *Qur’an* and *Sunnah* and in an unprecedented step, special tribunals called the ‘Shariat Courts’ were established to review legislation for its conformity with Islamic law (Yefet 2011, 553-615).

²² Fundamental Rights and Principles of Policy, articles 7–40.

²³ The Supreme Court of Pakistan has in *Mst. Fazal Jan v Roshan Din* PLD 1990 SC 661- 665 defined the word ‘State’ to include judicial officers.

This measure was further supplemented by the Enforcement of Shariah Act (X of 1991), which reaffirms the elevation of Islamic law as the supreme law of the land.²⁴

At the time of independence, Pakistan inherited the same legislative framework from British Colonial India. All personal laws enforced in pre-partitioned India are currently still valid and operative in Pakistan.²⁵ In 1955, the government appointed a commission under the Chief Justice of the Supreme Court, Justice Rashid, to examine the existing laws concerning marriage, divorce, maintenance and polygamy.²⁶ The commission had made a recommendation regarding the plight of women who are arbitrarily divorced and rendered destitute. It recommended that the wife should have the right to sue her husband for maintenance, and that the order of the court should be executable in a summary manner as arrears of land revenue. It is also recommended that a wife could claim past maintenance for at least 3 years before the institution of the suit for maintenance. On the issue of post-divorce maintenance, the question put to the commission was: should it be open to a Matrimonial and Family Laws Court, when approached to lay down that a husband shall pay maintenance to the divorced wife for life or till her remarriage? (The Report of the Commission, 1956: 1219–20).

The commission responded that in such cases the Matrimonial Courts should have jurisdiction to order a husband to pay maintenance to his divorced wife for the rest of her life, or until she remarried. The commission stated that ‘... a large number of middle aged women who are being divorced without rhyme and reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children’. The commission emphasised the importance of reinterpreting Islamic law ‘as no progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law’. However, the recommendation of the commission was opposed by one of its members who considered that payment of post-divorce maintenance to the divorced wife was a deprivation of the existing or present wife’s rights and her due share. He said:

The grant of maintenance to the divorced wife would not only mean monetary injustice to the present wife but also lead to the moral degeneration of the beneficiary. The aid from a man who has lived as a husband

²⁴ Section 4 provides: “For the purpose of this Act—(a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court”. Still, the act provides an exclusion clause, maintaining: “Notwithstanding anything contained in this Act, the rights of women as guaranteed by the Constitution shall not be affected”.

²⁵ The Dissolution of Muslim Marriages Act 1929, the Child Marriage Restraint Act 1929 and the Shariat Application Act 1937, to name a few. In 1948 the Punjab Legislative Assembly passed the New West Punjab Muslim Personal Law (Shariat) Application Act (ix of 1948) which enlarged the scope of personal law to questions relating to succession, including succession to agricultural land (whereas the previous act applied only to intestate succession). These changes were not welcomed in all parts of the country as men were still not willing to give women their share in property. As a result, to deprive women of their inheritance rights, amendments were made to the same act in the Province of Sindh and the following words were deleted from section 2 of the Shariat Application Act ‘save questions relating to agricultural land and other than charitable institutions and charitable and religious endowments’ (The Muslim Personal Law (Shariat) Application (Sindh Amendment) Act, 1950).

²⁶ An incident that triggered the emergence of this commission was the then Prime Minister Mohammad Ali Boghra's second marriage, which brought to light the issue of polygamy. Women activists held protests in front of the Prime Minister’s house. The unrest forced the government to appoint a commission to review family laws.

for a long time would mean a standing threat to the chastity of the divorced woman . . . The members of the Commission look only to the monetary aid while Islam aims above all at safeguarding the chastity of the divorced woman. Moreover, the continued payment of maintenance to the divorced wife would keep the mind of the present wife constantly vexed with suspicion. The proposal thus is ill-advised and harmful (The Report of the Commission, 1956: 1219–20).

The recommendation was also criticised by Maulana Maududi, a renowned religious scholar who considered post-divorce maintenance to be an undue burden on the husband who should not be compelled to bear the burden of her expenses for the whole of her life or till her re-marriage. The views expressed by these religious scholars demonstrate their efforts at protecting former husbands from any further financial obligation by using the chastity argument and showing concern for the new wife.

The commission submitted its report in 1956, but it was shelved under the pressure of the orthodox clergy. It was ten years later that the recommendations of the commission were finally implemented in the MFLO. MFLO marked an important attempt to reform family laws in Pakistan (Khan 2013, 728). This ordinance reformed the principles relating to payment of dower and maintenance to wives, ensured the inheritance rights of orphaned grandchildren of deceased persons in their estates and restricted polygamy.²⁷ Under the MFLO, all marriages and divorces are to be registered. The ordinance also provides for divorce by consent and gives delegated right of divorce (*Talaq-i-Tafwiz*) to women. However, the MFLO did not include a provision for giving post-divorce maintenance rights to women.

The issue of post-divorce maintenance was subsequently taken up by the Pakistan Law and Justice Commission in 1998 and in 2009. In its Working paper the Commission acknowledged that *Mata'a* has been referred to as a parting gift, consolatory gift, or indemnity by various Islamic law scholars and the provisions of *Mata'a* are in force in other Muslim countries where it is to be paid in addition to the payment of dower and maintenance during the *Iddat*. (Law and Justice Commission 2009, 5–20).²⁸ Members of the commission also expressed the view that the *Qur'anic* revelations are neither time or space limited, but are universal and eternal so that there is always a need for law reform. The attorney general observed that Pakistan is being criticised all over the world for violations of human rights and supported the recommendations made in the working paper by contending that it will raise the image of the country in the world community. The commission also proposed to include a column in the marriage contract (*Nikahnama*) and that an amount may be fixed as *Mata'a* to protect women after divorce. It proposed that no time limit or period may be specified for *Mata'a*, and an interim *Mata'a* may also be awarded. It is worth noting that when the commission sought the opinion of the Council of Islamic Ideology on

²⁷ Second marriages were made conditional on the first wife's permission as well as the sanction of a locally constituted arbitration council. Second marriages without consent became liable to one year's imprisonment and, a fine of up to Rs 5,000.

²⁸ It is interesting to note that post-divorce maintenance has been included within the family law of countries like Qatar, Egypt, Malaysia, and Morocco. In Qatar, post-divorce maintenance can be awarded to women for 3 years (Section 115 of the Family Reform Code 2005). It states: 1) The protection of mothers, particularly during pregnancy and child-rearing, and the protection of children without guardians; 2) Establishing competent courts to protect and preserve the family; 3) The provision of special insurance for widows, senior women, and women without support; and 4) Granting the guardianship of children to worthy mothers, in order to protect the interests of the children, in the absence of a legal guardian.

the issue, the council laid the responsibility of awarding post-divorce maintenance on the *Aulia* (male relatives of the wife), and in their absence, on the state. The Council of Islamic Ideology refused to accept the payment of *Mata'a* after the expiry of *Iddat*. By doing so, it absolved the husband from any such obligation towards the former wife. Instead, it proposed a draft legislative bill for providing *Nafaqah*, or support, to destitute family members including the mentally or physically disabled. This bill did not specifically mention divorced women who have no support available after the *Iddat*. Despite the contrary views expressed by the Council of Islamic Ideology, the commission submitted its own draft bill, 'the Muslim Family Law (Amendment) Bill 2009' which has a clause on post-divorce maintenance. This draft bill is a positive initiative, but no progress has yet been made as the provision for post-divorce maintenance has still not been presented to parliament.

However, a recent positive step has been the insertion of a clause regarding breastfeeding divorced mothers in section 9 of the MFLO 1961. Under this clause, a wife who is divorced and had passed the *Iddat* period but is breast feeding the infant from the past wedlock, may claim maintenance for breastfeeding the infant for a period of two years from her past husband, and if the husband dies, from his property or legal heirs as the case may be. Although payment of maintenance allowance to breastfeeding mothers is a positive step, it still falls short of providing maintenance to other divorced wives who do not have any means to support themselves and the children after the *Iddat* period.

B. Constitutional and Legislative Developments in Iran

The preamble of the Iranian Constitution clearly states that 'The family is the cornerstone of society. All laws, regulations, and administrative provisions must serve the purpose of facilitating the establishment of families and safeguarding the sacredness of the institution of the family and strengthening family relations on the basis of Islamic law and ethics'. The constitution also emphasises women's moral virtue as the key to the success of the family, and thus the nation (Azadarmaki and Bahar 2006, 590). In Iran, post-revolutionary social rehabilitation made female virtue a matter of public concern that justified state surveillance and intervention in private matters (Azadarmaki and Bahar 2006, 590). Osanloo (2012, 52) argues that since the revolution, 'the guardian of the state made both, family and women as a central focus of legislation and regulation' and women were portrayed as '*keeyan- khanevadeh*' or 'crowning jewels of the family', who needed to be regulated to preserve the honour and dignity of the family. Not only does the constitution view women through the lens of Islamic ideology but upon closer scrutiny, it became clear that these constitutional provisions do not recognise women as individuals, but rather as 'family', and as 'mothers, sisters, and wives' (Nayyeri 2013). Thus family is considered as the most basic institution from a historical and social point of view and is of high importance compared to other social institutions (Azadarmaki and Bahar 2006, 590). This has resulted in shifting the attention from women's rights to women's status in society.

Section 14, article 3, of the constitution states that 'state is responsible for the restoration of the full rights of women and men ... and (ensuring) the equality of all before the law'. Article 20 states that men and women should 'equally enjoy the protection of the law ... in conformity with

Islamic criteria’, while article 21 deals exclusively with women, prescribing inter alia, that the government ‘must create favourable conditions for the ... restoration of women rights, protect mothers, particularly during pregnancy and child bearing, support aged women, widows and women without support; and award guardianship of children to worthy mothers in order to protect the interest of the children, in the absence of a legal guardian’. At first glance, the constitution might appear to be progressive, but its stated principle of equality is subordinated to ‘Islamic criteria’, which in the constitution appears as a given qualifier. There is also ambiguity in how Islamic principles are defined. The hardliners use this ambiguity to give their own radical interpretation of Islam, which is against the equality of men and women. While the Iranian Constitution claims to guarantee equality for both genders, women are still treated as second class citizens and are discriminated against because of their gender. As a result, women enjoy neither full *de-facto* nor full *de-jure* equality with men (Barlow and Akbarzadeh 2008, 21-40).

In Iran the legislative process of codification of family law can be divided into three phases. The first phase began during the state-building years of the rule of Reza Shah with the enactment of the Iranian Civil Code between 1928 and 1935 (Mir Hussaini 2010, 327). There were twelve Shi’ite laws of marriage, divorce, legitimacy, and custody of children that were incorporated in the Iranian Civil Code (*Qanun-e madanī*).²⁹ This Code was the only European-based law code enacted in Iran that had references to *Shari’a* reflecting the majority opinion within the Shia jurisprudence (Hussaini 2010, 327). The 1931 Marriage Law (*Qanun-i-Izdiwaj*) enacted under the rule of Reza Shah, introduced registration of marriages in courts, gave women the right to petition for divorce in the civil courts and required all divorces to be registered, although the absolute power of divorce still remained in the hands of men. The promulgation of these two laws brought the family law under the state control which previously was under the domain of religious scholars.

The second phase of codification began under Mohammad Reza Pahlavi’s rule(1963-1978). Many legal barriers obstructing women’s rights were dismantled (Najmbandi 1991, 48). In 1963, despite the strong objections of religious clerics, such as Ayatollah Khomeini, the Family Protection Law 1967(FPL) (*Qanun-i- Himayat-i- khaniwadeh*) was passed. The FPL established special family courts, abolished extrajudicial divorce based on Shia jurisprudence, and restricted polygamy only allowing it under strict conditions (subject to judicial permission).³⁰ In 1975, this law was significantly amended. It raised the minimum age of marriage for girls from 15 to 18 and for boys from 18 to 20, custody of the children was given to women, and introduced the provision for post-marital claims under article 11 of the act. Article 11 imposed an obligation upon the spouse responsible for the breakdown of marriage to pay to the other spouse a monthly sum for support. No specific amount was mentioned in the article and it was left to the court to determine the amount by taking into account factors, such as the damage suffered by the innocent spouse, age of the spouse, the duration of the marriage, financial needs of the applicant and financial status of the respondent. However, this claim could only be made in adversarial

²⁹ Family law aspects were dealt with in six books enacted under part 2 of the Code in 1930 and were based on the Islamic law of the Ithna Ashari School.

³⁰ Family Protection Act 1967 Article 14, states that, “When a man, already having a wife, desires to marry another woman, he shall obtain permission from the court of law. The court shall give the permission only when it has taken the necessary steps, and, if possible, has made an inquiry from the present wife of the man, in order to assure the financial ability and [physical] power of the man for doing justice [to the wives].”

divorce proceedings and it was not extended to cases where the marriage was dissolved by *Khula* (divorce initiated by the wife) or *Mubbarat* (divorce by mutual consent) divorce. Yassari argues that the financial annuity under article 11 of the FPA was based on a hybrid legal ground, partly informed by concepts of tort law with a compensatory character (damage for financial loss), and partly by concepts of community solidarity based on the idea of continuous post-marital support duties of spouses according to the need of the applicant and the capability of the respondent (Yassari 2016, 62). The sub-clauses of article 11 provided for post-marital claims on a strict liability basis for specific groups of needy spouses, such as physically and psychologically impaired spouses, without consideration of the reason for the breakdown of the marriage (Yassari 2016, 62). Nonetheless, it seems that in practice article 11 of the FPA was largely ignored by the courts and later after the revolution, the FPA was suspended (Yassari 2016, 65). It is therefore difficult to assess the impact of these rules on the financial relations of spouses.

The third phase began with the Iranian Revolution. The legal system was Islamised, and all previous family laws were suspended by the Supreme Judicial Council.³¹ Family courts were dissolved and men were once again free to divorce their wives by simple declaration.³² Women could no longer file for divorce unless the right was stipulated in marriage contracts. The custody of children was to be given to the father in the case of divorce, restrictions on polygamy were also removed and the minimum age requirements for marriage were changed.³³ Legalising marriage for 8 year and 9 month old girls and removing the absolute minimum age of marriage could result in an increasing number of forced marriages, which could only be considered as a serious step backwards for women's rights in Iran.

During the following years, some articles of the Iranian Civil Code, especially in respect to marriage and divorce, were also amended. In 1986, article 1130 of the Code was amended to give the court more power to grant a judicial divorce requested by a woman in cases of *osr-va-haraj* (intolerable difficulty and hardship) that made the continuation of marital life impossible for the wife.³⁴ In such cases, even if the husband did not give his consent or cooperate, the court would divorce his wife on his behalf.

However, the rapid social change that Iran underwent in the aftermath of the revolution necessitated the need for a gradual, but constant, modification of some of the articles of the new laws introduced by the government (Vazan2015, 188). In 1989, a bill was introduced in parliament (*Majlis*) that proposed transferring the husband's power of divorce to civil courts. The Divorce Reform Bill, despite opposition from the conservative forces, received major support in

³¹ The Council was given remit to revise all existing laws to Islamise the legal system, with Ayatollah Khomeini's *fatwas* serving as 'transitional laws'.

³² Article 1133.

³³ Article 1041 of the Civil Code, which set a minimum age for marriage at 15 years old for girls and 18 years old for boys, was amended in 1982 and marriageable age for girls was reduced to 9 lunar years (8years and 9months) and 15 lunar years (14 years and 7 months) for boys. Under Articles 1075-77 In addition, the amended law gave the right to the natural guardian (*wali*) to marry at his own discretion for and on behalf of the child even before the age of puberty. The marriage of a virgin woman would require the consent of the father and a wife's obedience to her husband a necessary condition to obtain maintenance.

³⁴ Article 1130, amended 29 December 1982, states, 'In the following circumstances, the wife can refer to the court and request a divorce. If it is proved to the court that the continuation of the marriage will cause *osr-va-haraj* (intolerable difficulty and hardship), for the sake of avoiding harm and difficulty, the judge can compel the husband to divorce his wife. If it is not possible to compel the husband, then, [the wife] shall be divorced by permission of the judge.'

the *Majlis* and was then approved by the Guardian Council (*Shura-a Negheban*). As a result, in 1992 the *Majlis* enacted a law called Amendments to Divorce Regulation (*Layehe-i-Eslah-i-Talaq*).³⁵ Under this law, no divorce without a court certificate could be registered, and all couples going through divorce had to go through a mandatory process of arbitration in the presence of one mediator representing each party. In the event of reconciliation efforts failing, the court could declare *Talaq-i-Raji* (Revocable Divorce) that would become final after the husband had paid the wife her *mahr* (Dower) and the wife had completed her *Iddat* period.

This amendment to the Divorce Regulation also introduced the concept of *Ujrat ul Misl* (wages for housework). Under this law, the wife could ask to be compensated for household work that she had done on the demand of her husband, without being legally (and religiously) obliged to do so, and without the intent to do so gratuitously. She could claim *Ujrat ul Misl* for up to three along with the right to maintenance during *Iddat*. The aim was to give relief to a wife who does not wish to divorce and who is not guilty of any breach, to claim financial compensation from the divorcing husband. In such cases, women could petition for *Ujrat ul Misl*, and for the equitable division of marital property (Osanloo 2015, 11). However, conditions attached to *Ujrat ul Misl* were rather strict; for example, it could only be claimed in cases where the husband had asked for divorce and the wife had not caused the breakdown of the marriage, and the regulation only applied where the spouses had not agreed otherwise.

The Divorce Act also introduced an institution called *Nihli*.³⁶ *Nihli* could be claimed for whenever the conditions for a claim to *Ujrat ul Misl* were not met. The amount of *Nihli* would be determined by the courts with due consideration of the duration of marriage, the work undertaken and the financial possibilities of the husband. In December 1996, another legislation was passed by parliament which fixed the *Mahrieh* or *mahr* (the bride's portion or dower) to the rate of inflation, thereby making it more expensive for men to end their marriages without cause. Under these laws, a woman could petition the court that her husband's behaviour reflected poorly on her reputation and she could seek damages by asking for her *mahr*. If the judge did not agree with a wife's claim regarding her husband's failure to fulfill some duty specified in the marriage contract, the wife could use her *mahr* in exchange for the husband's consent to divorce.

Initially, these provisions were considered as a major achievement by the advocates of women's rights in Iran. These provisions attempted to limit men's ability to act capriciously and protected women by providing them the right to claim compensation for household services; however, a deeper insight into the *Ujrat ul Misl* provision raised concerns about its effectiveness, for instance, it was unclear whether *Ujrat ul Misl* would override or be awarded along with the entitlement of the wife to half of the marital assets of her husband, as provided in the Iranian marriage certificates. Secondly, the provisions were also inconsistent with article 336 of the Iranian Civil Code.³⁷

³⁵ Act on the Reform of Divorce of 19 November 1992, Official Gazette No. 13914 of 10 December 1992.

³⁶ Article 1, paragraph 6(b) of the Divorce Act. Although the Divorce Act has been repealed by the Family Protection Act 2013, the legal ground for *Nihli* was exempted. *Nihli* is now covered under article 58 of the Family Protection Act 2013).

³⁷ Under article 336, the wife could in any case apply for compensation without having to prove the strict conditions of *Ujrat ul Misl* under the Divorce Act.

However, interestingly, the enactment of the Divorce Act 1992 led to the revival of article 336 of the Civil Code in Iranian family courts (Yassari 2016, 68). Due to the strict conditions for claiming *Ujrat ul Misl* under the Divorce Act, the courts have in many cases used article 336 of the Civil Code to grant the wife post-marital compensation for work done in the household.³⁸ According to the new paragraph the wives who, on the demand of their husband, had done household tasks (which they were not legally obliged to do) had a right to be adequately remunerated. In other words, this right could now be claimed by the wife even during the subsistence of marriage, thus extending the scope of the article. In 2007, the Legal and Judicial Committee of parliament prepared a draft Family Protection Bill. This bill was then introduced in parliament by the cabinet of President Ahmadinejad, but it led to (The bill this controversy was finally enacted in 2013 and

A recent legislative development amidst widespread protests and debates within the parliament, as well as amongst activists, academics and religious scholars has been the enactment of Family Protection Act 2013 (FPA2013). that repealed the Divorce Act 2002 (Boe, 2015, 58). Under article 29 of the FPA2013, the claim to *Ujrat ul Misl* must be adjudicated under article 336 of the Iranian Civil Code and the courts have to take up the issue of *Ujrat ul Misl ex officio*, as the registration of the divorce judgment will not be processed if all financial claims of the wife are not clearly dealt with in the divorce judgment (Yassari 2016, 122). The FPA2013 also introduced the Replacement of Maintenance Payments (*Hazīnih barāy-i makhārij-i muta'ārif-i zindigī-i mushtarak*) provision under article 30, which gives the wife the right to claim for expenses that she incurred during marriage, either that she undertook on the demand of her husband or with his permission without having the intent to do so gratuitously. The reimbursement for the expenses incurred is without recourse to the principle of fault. The burden of proof lies on the wife, whereas the husband can reject the claim only if he proves that the wife had the intention to perform these tasks gratuitously.

These two provisions on compensation for housework and replacement of maintenance payments under Iranian law can be considered close to the Islamic concept of *Mata'at -ul Talaq*, as both provisions aim at compensating the wife. However, these still cannot be a substitute for the right to post-divorce maintenance, as one is linked with the concept of wages for housework and the other is about the claim to expenses incurred by the wife.

Another significant change is that under chapter 6, article 5 of the FPA2013, a single woman, irrespective of her age, has been allowed to petition the government for a portion of her father's retirement pension, even after his death. This law enables women whether a widow, a divorcée, or even a woman who has never married to receive financial support. This law fits within the broader world view that men should financially support women. Although it does not offer women financial independence, it does make some provision for women who are living on their own and who do not have the economic support of a male family member. This provision is significant because despite being introduced by the conservative Ahmadinejad government, it implicitly acknowledges that women do not always have recourse to male kin for financial support, and that there are women who do live as single mothers, and the current system of social security is inadequate to meet their needs.

³⁸ Court of First Instance Qom, Dept 5, judgment of 4 September 1999, file no 956; Court of First Instance Qom, Dept 5, judgment of 5 November 2000, file no 1712-1711; Court of Appeal of Qom, judgment of 2 January 2002, file no 111286, all these cases have been cited in Hidāyat Niyā (2004) 25 Muṭālī'āt-i Rāhburdī-i Zanān 15.

These attempts to codify family legislation in Iran clearly suggest that some measures have been taken to provide protection to women. However, the direction of the changes and the foundations of family law are still a matter of dispute (Osanloo 2010, 62). The debates around women's rights and status still continue. With Iran's current President Hassan Rouhani, who was re-elected in 2017, it is yet to be seen that his election promise of a moderate, modern and outward looking Iran where women will have equality with men will be translated into a reality, and whether women's rights will become a priority area for legal reform on his agenda.

One can thus argue that the constitutional norms of the two states enshrine the noblest aspirations of gender justice, equality, and human rights but that these constitutional provisions still remain pious hopes and mere lip service to those high ideals (Elahi, 2016). In a democratic society, it is not the written word of the constitution which ensures fair treatment to any particular class or section of the society, but the steps that the state takes to ensure such protection and fair treatment. It is therefore pertinent to take up measures as legislative reform for upholding the constitutional norms and the protection of equal human rights for all. Unfortunately, only half-hearted attempts have been made to provide protection and legal rights to women, and there has been an overall reluctance on part of the legislative assemblies in Pakistan and Iran when it comes to the question of giving post-divorce maintenance rights to women. In Iran, although an attempt was made under art 11 of the FPA 1975 to grant post marital annuity but it is still unclear if that has been invoked in the courts. Similarly attempts have been made to compensate the wife under the concept of *Ujrat ul Misl* and by introducing the concept of *Hazīnih barāy-i makhārij-i muta'arīf-i zindigī-i mushtarak* (replacement of maintenance payments), this again is in the context of wages and expenses that a wife can claim and not a recognition of her right to *Mata'at ul Talaq*. As compared to this, in Pakistan there are no such legal provisions as *Ujrat ul Misl* and *Hazīnih barāy-i makhārij-i muta'arīf-i zindigī-i mushtarak* for compensating the wife. Family law in Pakistan continues to be disadvantageous to women, as it leaves them in a vulnerable position after divorce and the legal system itself becomes an obstacle when change is required in legal rules, procedures, and institutions to remove inequality. Additionally, the state has failed to develop a comprehensive welfare system as a result women upon divorce have no means to support themselves, particularly in cases where they are financially dependent on husbands. To deal with such situations, it is pertinent to make provisions in the law for payment of *Mata'a* which could either be in the form of a lump sum payment or periodic payments.

III. JUDICIAL RESPONSE TO POST-DIVORCE MAINTENANCE IN PAKISTAN AND IRAN

The judiciary in Pakistan has played an important role in interpreting and applying Muslim personal law. Through judicial activism, judges have attempted to meet the challenges of social justice by allowing the law to be interpreted liberally, instead of following the views of classical ninth century jurists. In a number of family law cases, particularly those concerning *khula* and child custody, the Pakistani judges have demonstrated sensitivity to the plight of women and children and have taken into account the ethical, moral, and universal principles of Islamic law. By doing so, the courts have avoided the literal interpretation of the *Qur'anic* text and have deviated from the strict/classical interpretation of Islamic law. In *Mst Khurshid Bibi v Mohd*

Amin,³⁹ the Supreme Court of Pakistan held that ‘the judges have competence to reinterpret Islamic law in light of present day situations and that they could depart from the ancient jurists, if the opinions of the jurists conflict with the Qur’an and the Sunna, and that such opinions are not binding on the courts’.⁴⁰ In this case, Pakistani judges removed the requirement of the consent of a husband for a *Khula* divorce, by holding that a wife’s right to dissolve her marriage is equal to a husband’s right to divorce (*talaq*) (Abbasi 2016, 86). Similarly in custody cases, Pakistani judges declined to give ‘an automatic effect to the rules of *Hadana* (custody) enunciated by Islamic jurists’.⁴¹ These judgements are increasingly informed by social realities as well as predicaments of underprivileged and marginalised women and children. However, when it comes to the issue of post-divorce maintenance, the response of the judges has not been very sympathetic towards women. There is a silence on the part of the state’s legislative assemblies and judges also have refused to extend the principle of *Mata’a* beyond the expiry of the *Iddat*.

In Pakistan, a number of cases were reported in which the courts have refused to award post-maintenance to wives after the *Iddat*. In *Inamul Ahsan v Hussien Bano* and later in *Saadia Begum v Jangreez*, the court stated that ‘maintenance beyond the period of *Iddat* is illegal and without lawful authority’. The court held that section 9 of the MFLO does not include the right to post-divorce maintenance; therefore, it would be illegal to extend this right to the wife after the *Iddat*. While a consistent sympathetic approach has been followed by the superior judiciary in Pakistan towards women in other family law matters, in post-divorce maintenance cases, the courts have refrained from making any radical reform to the existing provisions. Their response suggests that in the absence of any legislative provision for post-divorce maintenance, the courts in Pakistan are restricted to the payment of maintenance only for the period of *Iddat* and for the arrears of maintenance, if the wife was not given any maintenance during marriage.

However, after the insertion of a new clause in the MFLO regarding the provision of providing maintenance to breastfeeding mothers, in a recent judgment in *Muhammad Aslam v Muhammad Usman and 4 others* the Lahore High Court held that the divorced wife is entitled to receive a maintenance allowance from her husband for breastfeeding her baby for two years.⁴² Justice Fakhar-un-Nisa Khokhar wrote this judgment relying on *Qur’anic* verses of *Surah al-Baqarah* 233 and 241 and by citing the famous Indian Shah Bano Begum’s case for post-divorce maintenance.⁴³ This decision by the Lahore High Court paved the way for making amendments in section 9 and led to the insertion of a clause for breastfeeding mothers. However, the courts in Pakistan are still not willing to give post-divorce maintenance rights to other divorced women. It is interesting to note that prior to the independence of Pakistan, there have been cases where the judiciary has recognised that the wife is entitled to a special allowance known as the *Kharcha i-Pandan* (betel box expenses) or *Mewa Khori* (allowance for eating) in ante-nuptial agreements between the parties to the marriage (Diwan 1997, 60). In *Ali Akbar v. Fatima*, the court held that under an ante-nuptial agreement, in addition to the amount of maintenance, the husband would also give a sum of Rs. 25/- monthly even when the wife has lived separately. The agreement was

³⁹ PLD (1967), SC 97.

⁴⁰ *ibid.*, 99.

⁴¹ *Sardar Hussain v Mst. Parveen Umar* PLD 2004 SC 357. In this case, the custody of minor sons of over seven years was given to the mother, even though she contracted another marriage.

⁴² PLJ 2004 Lahore 1075.

⁴³ *Muhammad Ahmad Khan v Shah Bano Begum* (1985) AIR 1985 SC 945.

held valid and enforceable.⁴⁴ In the absence of a legislative provision, it could be possible that ante-nuptial agreements can be entered into between the couple for post- divorce maintenance.

In Iran, there have been cases where the courts have compensated women by giving them *Ujrat ul Misl*. In an *Ujrat ul Misl* case decided in 2002, the wife argued that she had been paying herself for all the expenses incurred during the common life (subsistence of marriage) and she had been performing household chores without the intent of *Tabarao* (intent to be paid).⁴⁵ The court held that as the wife had done all the household chores which were not her duty under the *Shari'a*, but were ordered by the husband therefore the request of the litigant is lawful. The honourable judge held that the wife was entitled to receive *Ujrat ul Misl* on the basis of the fundamental Islamic principle that any work done by a Muslim has value and should be compensated. In this case the court also exempted the litigant wife from paying litigation costs.

In another case it was held that the wife is entitled to receive compensation for household chores as she has performed them with no intent of *Tabarao*.⁴⁶ As the husband during the common life (subsistence of marriage) had never appreciated the work and contribution of his wife, he should now compensate her financially. The court also held that the burden of proof lies on the husband if he considers that the wife had done the work with the intention to receive *Tabarao*. In addition, in the certificate of non-compliance, only financial rights related to *Mahr* and *Nafaqah* have been liquidated and the liquidation of *Ujrat ul Misl* has not been mentioned. Thus, the judgment of the lower court complies with the laws and regulations and is upheld according to article 358 of Civil Procedure Code and cannot be reversed.

In another case, the court held that the husband should pay the wife the amount of 380,000,000 riyal (US\$1104) as *Ujrat ul Misl* for the time they lived together as husband and wife from 1976-2013.⁴⁷ In this case the husband was a follower of the Shaafi'i School therefore the court held that under article 963 and under 4th note of article 4 of the FPA2013, the law of the husband should apply. The court further held that according to the above-mentioned note, the decision of the high council of the *Shaafi'i* school based on the official letter no. 59/146 dated 7 January 2017, the wife is entitled to receive the *Ujrat ul Misl* if the household chores were done without the intent of *Tabarao* and by the order of the husband. The court held that it is not necessary that the husband has explicitly ordered his wife to do the work, only the expectation suffices. Therefore, the claim of the wife that she has done the work upon her husband's orders can be accepted. The burden of proof lies on the husband if he denies that he had ordered her to perform the work.

A petition filed by a former wife for compensation for the duration of the common life (from 23 September 1993 – 8 February 2017) was also accepted by the court in Tehran.⁴⁸ The court in this

⁴⁴ 1929 11, Lah 85, cited in Paras Diwan, id. at 131.

⁴⁵ Judgement no. 94049744 by the Shahid Mofateh Court of Tehran. (This is a translation of the judgement. The judgement is available on file with the author.)

⁴⁶ Judgement no. 9833798400595 The Board of the fifteenth branch of Kermanshah Appellate Court. (The judgement is available on file with the author.)

⁴⁷ Judgment no. 9578450300605 issued on 7 April 2016 by the first branch of the Civil Court of Paveh. (The judgement is available on file with the author.)

⁴⁸ Judgment no. 1358 issued on 18 July 2017 by the Civil Court of Tehran. (The judgement is available on file with the author.)

case held that in accordance with the fundamental principle that any work performed by a Muslim has value, and on the basis of the facts of the case that the petitioner had been carrying out work which was not her duty and without the intention of *Tabarao*, the petitioner was therefore entitled to receive 225/000/000 riyals (US\$690), as calculated by the legal expert. The court further held that according to article 336 of the Civil Code, its attached note enacted in 31 July 2002 by the Iranian Parliament, and under articles 257, 519 and 520 of the Civil Procedure Code, the husband was to pay the wife the amount which is equal to the amount of the *Ujrat-ul-Misl*. The respondent was also bound to pay the costs of the litigation and the costs of service of the legal expert.

While it was thought that women would not petition for *Ujrat ul Misl* because they find it humiliating and feel downgraded to the status of a cheap labourer. It was also feared that uncertainty as to the precise amount will place *Ujrat ul Misl* on shaky grounds (Yassari 2015). However, in practice we have seen that women are claiming *Ujrat ul Misl* and the courts have decided cases in favour of women. The burden of proof for *Tabarao* which initially was considered to be a wife's responsibility has, under a recent amendment to the law, shifted to men. It is now on men to prove *Tabarao* and with this amendment in law, women find it easier to file cases demanding *Ujrat ul Misl*.

IV. INCORPORATING POST-DIVORCE PROVISIONS IN LAW: SOME SUGGESTIONS

The review of legislative provisions and court cases in Pakistan and Iran (except for the provision of *Ujrat ul Misl* and *Hazīnih barāy-i makhārij-i muta'arīf-i zindigī-i mushtarak*) show that the judges have refused to extend the principle of *Mata'a* beyond the expiry of the *Iddat*. It is surprising that the courts in Pakistan, in particular, have not taken account of the lived realities of women, such as the poor socio-economic position of the wife, and abusive marital relations in which women are subjected to continuous domestic violence. The response of the judiciary raises a number of questions regarding its approach to the issue of post-divorce maintenance. Is the reluctance to award post-divorce maintenance because of the long-term financial implications for the husband? Is it because of the fact that, if made part of the law, the husband would be bound to provide the former wife maintenance until her death or her remarriage to another man? Is there a fear of losing control over women or a threat to patriarchal norms of male domination and control? Is the response of the judiciary a restatement and reinforcement of the patriarchal structure of a society where male domination and protection of men's interests are still a norm? Finally, does the response of the judiciary exemplify that the courts in Pakistan and Iran are willing to use Islamic law only to a certain limit, stopping short of engaging with evolving the concept of *Mata'a*?

It is also humbly submitted that the judges could have also made their judgements by looking at the Qur'an itself. In the Qur'an there are a number of verses that emphasise supporting weaker segments of society like women, orphans, slaves, and the needy. It established the marital bond on the basis of 'love' and 'mercy' and declared the spouses to be 'garments unto each other'

(Rehman 1980, 451-456). At the same time, there are clear Qur’anic verses that support *Mata’a* (post-divorce maintenance) for a divorced wife after the expiry of *Iddat* so that women are not left in an uncertain or unstable situation after the divorce.⁴⁹ These verses can form the basis for law reform and for giving post-divorce maintenance rights to women, for instance the Qur’an clearly states that it is an obligation of the husband to bequeath one year’s maintenance for the wife in case of his death and that the widow should not be thrown out of the house unless she leaves the residence out of her own free will.⁵⁰ A logical interpretation of fixing the time limit ensures that a woman has support available until she finds another husband or in the case that she is pregnant, she is provided maintenance for at least one year. The most significant is verse 241 ch:2, “For divorced women maintenance (should be provided) on a reasonable scale.” This verse does not set any time limit for maintenance to divorced women, nor does it lay a specific limit to the amount of *Mata’a*, mentioning ‘reasonable maintenance’ only. In other words, the Qur’an lays down a minimum requirement, and nowhere in the Qur’an is there a prohibition on providing more than the minimum and post-divorce maintenance is to be given to the wife with kindness and humility.

The courts could use these Qur’anic verses to grant post-divorce maintenance rights. References to the Qur’anic text provides legitimacy to the demand for post-divorce maintenance and it will be easier to convince the religious orthodoxy in both states to give this right to women, as the financial support will reduce the unpleasant effects of the divorce faced by women and their children. Using the religious argument along with the human rights and gender justice discourse, could be a way forward in achieving post-divorce maintenance rights. Such hybrid approach will neither be solely based on the views of classical Islamic scholars’ interpretation that restricts maintenance rights to the *Iddat* period only, nor would it be purely framed in the so called ‘Western’ discourse of human rights, but will be something that will be acceptable to both the conservative and liberal elements of society.

One can thus argue that to provide protection to divorced women, a hybrid strategy needs to be adopted that is based on both moral and ethical principles of *Shari’a*, as well as the constitutional and human rights norms of the states. Family law reform in Muslim countries may draw inspiration from Qur’anic principles, but at the same time should uphold constitutional norms and adhere to human rights frameworks that the states have signed and ratified.

The judiciary in Pakistan and Iran could also gain insights from the judicial decisions in India and Bangladesh where judges have intervened to give post-divorce maintenance rights to Muslim

⁴⁹ The Qur’an in Ch33:49 states “O You who have attained to faith! If you marry believing women and then divorce them ere you have touched them, you have no reason to expect, and to calculate, any waiting period on their part: hence, make [at once] provision for them, and release them in a becoming manner”. This verse sets the rule that if a Muslim man divorces a Muslim woman he is bound to make provisions for maintenance immediately and to release them from the marital tie in a respectable manner. The second verse where we find reference to *Mata’a* is in ch2:236 where the Qur’an states; “There is no blame upon you if you divorce women you have not touched nor specified for them an obligation. But give them [a gift of] compensation - the wealthy according to his capability and the poor according to his capability - a provision according to what is acceptable, a duty upon the doers of good”. refers to a situation where no dowry has been specified and a woman is divorced before the marriage is consummated, obligating the husband to give the divorced wife a gift as a compensation for the divorce according to his means and financial position.

⁵⁰ The Qur’an in Ch2:240 states “And those of you who die and leave behind wives should bequeath for their wives a year’s maintenance and residence without turning them out, but if they leave, there is no sin on you for that which they do of themselves, provided it is honourable and Allah is Almighty, All Wise”.

women. The Supreme Court of India in *Shah Bano v Mohd Ahmad Khan*⁵¹ and *Daniyal Latifi v Union of India*⁵² took upon itself to interpret the *Qur'anic* verses by reviewing a range of Islamic sources of law as well as the constitutional provisions of the Indian Constitution. In doing so, it drew on the egalitarian ethics of Islam to ensure that Muslim women are protected from falling into destitution (Mullally 2004, 671-692). By assessing the provisions of the Muslim Women (Protection of Divorce) Act 1986 vis-a-vis constitutional mandates, a definitive interpretation of the vague clauses of the Act was provided that created room for providing post-divorce maintenance on the basis of 'fair and reasonable provision'. These judgements clearly suggest how judges in India have skilfully paved a way forward to provide post-divorce maintenance to Muslim women without abolishing the Muslim personal law system. In the light of these judgements, the judiciary in Pakistan and Iran can take steps to provide legal protection to divorced women.

In Bangladesh, the Division Bench of the High Court in *Hafiz-ur-Rehman v Shamun Nehar Begum* case considered the question of whether a divorced wife could claim maintenance beyond the *Iddat*. The two presiding judges, after establishing their jurisdiction to interpret the *Qur'an*, stated that maintenance is applicable not only during *Iddat*, but also for the rest of a divorced woman's life or until remarriage. They emphasised that the ruling was in accordance with the will of Allah, as expressed in the *Qur'an*, and as such, should be understandable to the public. The High Court of Dhaka made a sensible comment that post-divorce maintenance 'may be statutorily provided for [...] poor women who are destitute and are suffering [at] the hands of unjust and cruel husbands,' and that such 'beneficial legislation will not be against Muslim personal law and will be in conformity with the ideas of justice, tolerance and compassion that the Holy *Qur'an* enjoins on all righteous and true Muslims'. The court further held that 'a person divorcing his wife is bound to maintain her for an indefinite period, that is to so say, till she loses the status of a divorcee by marrying another person'. However, the decision of the High Court was overruled by the Appellate Division of the Supreme Court.⁵³ The Appellate Court relied on the commentaries of Hanafi law, particularly the *Hedaya* and *Fatawa-i-Alamgiri*, and the judges held that the word *Mata'a*, as used in the *Qur'anic* verse 2:241, was never understood as regular maintenance, rather, it was deemed to be a 'parting gift' to a divorced woman. It was a gesture of comfort for the trauma she had suffered on account of the divorce. Justice Mustafa Kamal further held that on the basis of section 2 of the Muslim Personal Law (Shariat) Application Act 1937, no change could be made to Muslim personal law, and the husband was liable to pay maintenance only during the *Iddat*. He further stated that the provision of the 1937 act is supported by article 8 (1A) of the constitution, which says that, '[t]he principles of absolute trust and faith in the Almighty Allah . . . shall be the basis of all actions'.

Although the Court accepted *Mata'a* as a compensatory or consolatory gift to the wife, it appears that the judges in the Appellate Division missed a historic opportunity to take judicial action on post-divorce maintenance as other states have done through legislation (Sirajuddin 2011). Similarly, the judgement given by the Lahore High Court in Pakistan in which reference was

⁵¹ AIR 1985 SC 94

⁵² AIR 2007 SC740

⁵³ The issue before the Appellate Division was to decide 'whether the High Court's interpretation of and decision to follow the aforesaid verse of the *Qur'an* to maintain his ex-wife on a reasonable scale beyond the period of *Iddat*, for an indefinite period, unless she remarries another person, was supportable or otherwise, on merit as well as (purely) in terms of the facts and circumstances of the case'.

made to the Qur’anic verse 241 chapter 2, could be used to support an amendment in the law so that the right to receive post-divorce maintenance for up to two years is not just limited to breastfeeding women, but extended to all divorced wives.

The legislative assemblies in Pakistan and Iran can also learn from the examples of those Muslim states that have inserted legislative provisions for post-divorce maintenance into their respective family law codes.⁵⁴ In Algeria, under article 52 of the Family Code of 2005, the court can order a husband to pay compensation to the ex-wife and the same applies under article 53 to a husband whose wife divorces him with justifiable grounds. In Tunisia, a divorced wife can claim to continue alimony in keeping with the marital standards of living. Tunisia also has the ‘Community of Property Law’ which is a separate law from the Law of Personal Status and Property Law. Under this law, spouses can enter into a contract either at the time of marriage or any time during the marriage to regulate immovable properties like the matrimonial home to be in the joint name.⁵⁵ The Community of Property Law is intended for property to be held jointly irrespective of the proportions assigned to each spouse. The law in other words does not specify whether joint ownership by spouses means in equal proportions. The contract comes to an end at the time of divorce or judicial separation. The other two examples of financial protection are the provisions for *Ujrat ul Misl* and the Replacement of Maintenance Plan as discussed earlier, under the Iranian law which can also be incorporated in the law in Pakistan.

These examples show that Islamic law in the 21st century is eclectic and can be subject to further reform. It is also pertinent to mention that in the Islamic legal tradition, the concepts of *Tajdid* (renewal) and *Islah* (reform) have been developed which can be used as the basis for law reform (Ramadan 2009; Kamali 2011). By taking a wider perspective of *Tajdid* and *Islah*(reform), along with the principle of *Ijtihad* and its accompanying juristic techniques such as *Takhhuyur*(eclecticism), *Talfiq* (patchwork) and *Daroor* (necessity), the gap between theory and practice of Islamic law today can be bridged. Borrowing principles from other schools of thought on the basis of juristic techniques has been a practice of the Muslim scholars.⁵⁶ Pakistan,

⁵⁴ Egypt (article 18a of the Egyptian law No. 100 of 1985); Algeria (article 52 Law No. 11 of 1984 on the Family Code of 9 June 1984, Official Gazette No. 24 of 12 June 1984 as amended by Law No. 2 of 27 February 2005, Official Gazette No. 15 of 27 February 2005); Morocco ((article 84 Law No. 70.03 of 2004 on the Family Code (Mudawwana) of 3 February 2004, Official Gazette No. 5184 of 5 February 2004)); Tunisia (article 31 of Personal Status Law of 13 August 1956, Official Gazette No. 66 of 17 August 1956); Libya (article 51 Law No. 10 of 1984 on Personal Status of 19 April 1984, Official Gazette No. 16 of 3 June 1984); Oman (article 91 Law No. 32 of 1997 on Personal Status of 4 June 1997, Official Gazette No. 601 of 15 June 1997); Jordan (article 155 Law No. 36 of 2010 on Personal Status of 26 September 2010, Official Gazette No. 5061 of 17 October 2010); Kuwait (article 165 Law No. 51 of 1984 on Personal Status of 7 July 1984, Official Gazette No. 1570 of 23 July 1984); UAE (article 140 Federal Law No. 28 of 2005 on Personal Status of 19 November 2005, Official Gazette No. 439 of 30 November 2005); Bahrain (article 52(d) Law No. 19 of 2009 on the Family Code (pt 1) of 27 May 2009, Official Gazette No. 2898 of 4 June 2009); Iraq (article 39, paragraph 3 Law No. 188 of 1959 on Personal Status of 19 December 1959, Official Gazette No. 280 of 30 December 1959); Syria (article 117 Law No. 59 of 1953 on Personal Status of 17 September 1953, Official Gazette No. 63 of 8 October 1953); and Qatar (article 115 Law No. 22 of 2006 on the Family Code of 29 June 2006, Official Gazette No. 8 of 28 August 2006).

⁵⁵ In practice what happens is that women buy a house from their own savings or earnings and register it in the husband’s name. This law provides a security to women to have their share in the property, thus creating a community of property regime.

⁵⁶ Muslim scholars have adopted non-Hanafi interpretations when it comes to giving women rights, for instance recognising a woman’s right to seek dissolution of her marriage on the basis of her husband’s cruel behaviour

which has a predominance of Hanafi adherents, implements Maliki-based Muslim laws, too, for instance while framing the MFLO 1961, inspiration was drawn from the interpretations of other schools of thought and by applying *talfiq*. This by itself should be enough to realise that where borrowing from one school would be more consonant with principles of justice, fairness and equity, it would be erroneous not to do so. Using such a comparative and plural legal interpretative methodology will allow a departure from classical Islamic law by giving post-divorce maintenance rights to women in Pakistan and Iran, and will pave the way for law reform.

The law reform process needs to be flexible, forward-looking, women-friendly and more inclusive in its approach. Finally, the aim of such reform should be to achieve gender and social justice for the weak and poor, and to create a just social order by focusing on broader principles of *Rahimah* (compassion), of *Al-'adl wa'l-ihsan* (being good to others) and achieving *Adl* (justice) for women.

CONCLUSION: This research has shown that there is a need for a more sensitive understanding of the objective of *Mata'a* and of the lived experiences of women. Post-divorce maintenance can be a safety net for women in the absence of a state welfare system and family support. Post-divorce maintenance rights will give women some financial security particularly in cases where women have not been earning and are financially dependent on their husbands, and have no other means to support themselves. It is also pertinent to give post-divorce maintenance rights to women in cases where the divorce takes place as a unilateral act of the husband or where it was not the fault of the woman.

There are clear references in the Qur'an for giving post-divorce maintenance to women. On the basis of these Qur'anic verses, post-divorce maintenance can be given as a parting gift or in monthly instalments to fulfil their financial needs. Restricting post-divorce maintenance to the *Iddat* period only undermines the spirit of the principles of justice, humanity, dignity, and compassion emphasised not only in the Qur'an, but also under the constitutional provisions and the international human rights norms to which both Pakistan and Iran have committed themselves to. It is therefore suggested that the MFLO 1961 and Family Protection Act 2013 in Pakistan and Iran, respectively, should be amended and should include the provision of giving post-divorce maintenance to women. It might be a useful strategy to make their demands for bringing changes to the substantive law and to link their struggle for law reform by making references to the original Qur'anic texts along with arguing on the basis of the notion of gender justice, equality and human rights. This strategy is likely to be more acceptable and will also give legitimacy to their demands.

The response of the judiciary reflects that a conservative trend exists in relation to the issue of giving post-divorce maintenance rights, despite the fact that a more progressive approach has been adopted by the courts in relation to other family law matters. Although the superior judiciary in Pakistan has, through judicial activism, adopted a liberal and progressive approach, it has not yet filtered down to the subordinate judiciary. This has resulted in negative implications for family law cases. A coherent and consistent approach is needed while dealing with family law matters. The judges at the lower and higher levels must be trained to interpret and apply Islamic norms, and international human rights norms along with the statutory law. The courts, by

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exercising judicial activism, can ensure that divorced women are not left in a vulnerable situation as the courts have done in other family law cases to provide protection to women and children.

Finally, a comparative and plural legal interpretative methodology can provide the space to use religious texts along with contemporary human rights frameworks and normative constitutional principles, to give Muslim women the right to receive post-divorce maintenance in Pakistan and Iran.

For Review Only

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